BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

CRISTAL USA, INC.,

Employer

Case No. 08-RC-184947

-and-

INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL OF THE UNITED FOOD & COMMERCIAL WORKERS, AFL-CIO, CLC,

Petitioner

UNION'S OPPOSITION TO CRISTAL USA, INC.'S MOTION FOR RECONSIDERATION OF THE BOARD'S ORDER OR, IN THE ALTERNATIVE, TO CONSOLIDATE CASES

Now comes the Petitioner, the International Chemical Workers Union Council of the United Food & Commercial Workers, International Union, AFL-CIO, CLC (Union), by and through the undersigned counsel, and hereby files its opposition to the motion (Motion) of Cristal USA. Inc. (Employer) to reconsider its order in this case (Cristal I) denying the Employer's request for review (RFR) in the above-captioned matter, or, in the alternative, to consolidate this case with Case No. 08-RC-188482 (Cristal II), for the reasons set forth below, as well as for those previously argued in the "Union's Response to Cristal USA, Inc.'s Request for Review of the Regional Director's Decision and Direction of Election" in this case (Response)(Employer Exhibit A, Ex. 1).

SUPPLEMENT TO CRISTAL'S PROCEDURAL HISTORY

While criticizing the (Acting) Regional Director and the Board majority for purportedly failing to consider all of the facts and circumstances presented in Cristal I and Cristal II, together,

the Employer failed to even attempt to timely provide the "facts," that it now attempts to provide to the Board to support this contention. Cristal attached almost no substantive evidence to its RFR in this case.

On December 22, 2016, when Crystal filed its request for review in this case, the hearing already had been held in Cristal II on November 30, 2016.[1/] In the "Union's Response to Cristal USA, Inc.'s Request for Review of Regional Director's Decision and Direction of Election" at 1–2 in this case, Cristal I, the Union emphasized that Cristal failed to comply with NLRB Rule 102.67(e)'s requirement that its request for review "must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record," since it only attached four, relatively innocuous exhibits to its RFR. In fact, Cristal failed to attach *any* transcript pages or substantive exhibits from Cristal I to substantiate its factual assertions, when it filed its RFR in this case. Significantly, Cristal also failed to attach any of the exhibits that it now belatedly attempts to include with its motion for reconsideration from the Cristal II record, even though the hearing in Cristal II already had been held. Cristal gives no reason, let alone a good reason, why it did not seek to include the material from Cristal II with its request for review in this case, which it now attempts to belatedly include with its Motion.

ARGUMENT

A. The Employer's Belated Request to Consolidate is Untimely and Must Be Rejected.

For the first time in this case the Employer, as part of its motion for reconsideration, seeks

[1/] The Employer requested and was granted an extension of time to file its request for review in this case. In its extension request, it did not seek an extension suggesting that the transcript was not yet available from the hearing in Case 08-RC-188482, nor did it represent that it had placed an order, or expedited order, for that transcript, but not received the transcript yet. The Union believes that Cristal, in fact, had the transcript from Cristal II well before December 22, 2016.

to have the above-captioned case consolidated with Case No. 08-RC-188482 pursuant to NLRB Rules 102.65(e)(1) and 102.72(a)(2).[2/] The Employer's request to consolidate is untimely and without merit. Under Rule 102.65(e)(1), " No motion for reconsideration… will be entertained by the Board … with respect to any matter which could have been but was not raised pursuant to any other section of these rules…" Since the Employer did not, but could have, previously requested that its RFR in this case be consolidated with Cristal II, its current request is untimely and may not be entertained by the Board.[3/]

The Employer's reliance on Rules 102.72(a)(1) and (2) for its consolidation motion *to the Board* is based on selective quoting and is misplaced and misdirected. The Employer only quotes part of Rule 102.72, erroneously suggesting that it is *the Board* to which that Rule is directed. However, by its terms, the Rule is directed *to the General Counsel* who may permit consolidation, presumably if requested much earlier in the proceedings than exist here.

Nevertheless, the Employer, again, is belated in its request to consolidate. The Rule that permits this untimely motion, Rule 102.65(e)(1), makes clear, as shown above, that any request for consolidation should have been made much earlier in the proceedings than now. Not having been previously requested in this case, the motion to consolidate cannot now be entertained and should be denied.

[2/]The Employer recently filed similar motions in Case 08-RC-188482, which remain pending.

[3/]The certification in Cristal I was not issued until November 25, 2016, while the Petition in Cristal II was filed on November 21, 2016. Cristal gives no reason why it could not have sought consolidation of these two cases either prior to certification, or before it sought its request for review in this case. *See* note 1, *supra*, and accompanying text.

B. The Union's Response to the Employer's Summarization of the Legal Standard to Apply.

The Union concurs that Rule 102.65(e)(1) requires the Employer show "extraordinary circumstances" before reconsideration of the Board's denial of its request for review may be granted. However, the Employer has failed to establish those " extraordinary circumstances," particularly since Cristal failed to submit any self-contained documents with its RFR initially. It should not now be permitted to try and correct its error through belated submission of documentation from another case with its motion for reconsideration, particularly when the standard requires "extraordinary circumstances."

C. All of the Material from Cristal II that the Employer Seeks to Have the Board Consider Should Be Disregarded as Being Untimely Proffered.

The Employer could have proffered most of what is attached to its motion as Exhibit A, when it filed its RFR in this case. It didn't! Consequently, Rule 102.65(e)(1) precludes the Board now from entertaining any matter that could have been, but was not, previously presented. Therefore, those exhibits must be disregarded in this case.

D. The Union's Response to the Employer's Statement of Material Errors the Board Should Reconsider.

To support its claim of "extraordinary circumstances," the Employer specifically asserts that the Board majority overlooked that Cristal purportedly showed that, given the "setting and circumstances presented here," which it contends are, in material respects, "unlike ones the Board has considered since changing the law," the (Acting) Regional Director misapplied Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB 934 (2011), *enfd. sub. nom*., Kindred Nursing Centers East, LLC v. NLRB, 727 F.3d 552 (6th Cir. 2013). However, in Specialty

Healthcare, *supra* at 943-46, the Board explained that it merely was returning to its traditional community-of-interest standards and "overwhelming community-of-interest" framework" for the healthcare industry, that it traditionally used in *other* industries; it also commented that it was not changing the law, but merely acknowledged that it may have used slightly varying verbal formulations for the "overwhelming" community-of-interest standard. Indeed, in this case, the Board re-affirmed that the framework set forth in Specialty Healthcare merely "adheres to well-settled precedent."

Thus, Cristal's assertion that "extraordinary circumstances" exist, because the facts and its arguments here differ materially "since changing the law," regarding establishment of bargaining units, is based on a false premise. The law in this area *for this industry* has not changed materially. The traditional principles and analytical framework *for this industry* have not been changed materially by Specialty Healthcare. Thus, there are no extraordinary circumstances to justify reconsideration on *that* basis.[4/]

Cristal's request for reconsideration is based to a large extent on its effort to tie the North and South Plant production employees -- who operate separately from each other, with little or not interaction with each other -- through the warehouse. Yet, despite failing to provide any evidence

---

[4/] Cristal specifically contends that the Regional Director inappropriately disregarded, or failed to give appropriate weight to, facts purportedly establishing that the North Plant production employees have an overwhelming community-of-interest with the South Plant production, warehouse, and maintenance employees. Cristal also contends that the Board majority failed to appropriately consider the facts and circumstances presented in Cristal I and II, together. Yet, Cristal never previously timely requested consolidation of those cases, nor did it previously present any evidence from Cristal II in this case for the Board to consider. However, the Union already has shown that the (Acting) Regional Director in this case properly found that the petitioned-for employees do not share an "overwhelming" community-of-interest with the other employees. (Response at 8–14).

at all with its RFR in this case on that issue, Cristal barely recognized in its Motion that the warehouse employees, who have their own "distinct wage scale," not only fall within a different department from the production and maintenance employees, but also fall within a completely different supervisory chain-of-command, including for disciplinary purposes. (Employer Exhibit A, Ex. 1: Cristal II, DDE, p. 11-12). On factors that are critical ***from the warehouse employees' viewpoint*** – wages and discipline – determinations are made by different supervision for them on a day-to-day basis and on up through the corporate level, than for production and maintenance employees.

Contrary to Cristal's suggestion, the Regional Director previously addressed its assertion that a warehouse unit, standing alone, was not sufficiently distinct and did not have an overwhelming community-of-interest with the production and maintenance employees. (Employer Exhibit A, Ex. 1, Cristal II, DDE, p. 11). He found that the warehouse employees have distinct job functions and perform distinct work separate and apart from the employees that Cristal seeks to include them with; that the warehouse employees' *primary* job responsibilities are performing the traditional functions of warehouse employees, including receiving materials for packaging and shipping finish products, at the warehouse, contrasting that to production employees, whose *primary* function is to work in the production facility and field, where they turn raw materials into final products, while maintenance employees are to service the facility, upgrade machinery and processes, and ensure that the plants are running effectively, efficiently, and safely. (Employer Exhibit A, Ex. 1, Cristal II, DDE, p. 11).

Consequently, the Regional Director was on solid ground, when he found a unit of warehouse employees was a "readily identifiable group" separate from the production and

maintenance employees and that they shared a community-of-interest with each other. The Union previously in Cristal II established that the so-called "facts" on which Cristal now relies, suggesting that the Regional Director overlooked, or failed to afford them appropriate weight, were not to the contrary. (Employer Exhibit A, Ex. 7: Union's Response at 8–12).

Yet, none of this really matters here, since the Employer failed to timely present any of this Cristal II material to the Board with its RFR in Cristal I, which it could have attempted to do! Now, it simply is too late under Rule 102.65(e)(1) to present this material *in this case*.

Cristal raises no new arguments to support its reconsideration motion other than to reiterate its claim that the (Acting) Regional Director erred in finding that the production, maintenance, and warehouse employees share an overwhelming community-of-interest with each other. Indeed, much of Cristal's argument is either simply lifted from its RFR on this issue or merely re-worded. However, that simply is not sufficient to meet the test of "extraordinary circumstances" to support a reconsideration motion, particularly when the Employer failed to support its RFR with self-contained documentary evidence.

The Union already has rebutted Cristal's arguments, showing there is no overwhelming community-of-interest among the North and South Plant production, maintenance, and warehouse employees. (Employer Exhibit A, Ex. 7, Union Response at 8–14). Nevertheless, the Union emphasizes that, in criticizing the (Acting) Regional Director for purportedly incorrectly discounting the "fact" that the production, maintenance, and warehouse employees arguably share some of the same terms and conditions of employment, Cristal conveniently ignores major differences ***from the employees' perspective*** that the warehouse employees, for instance, not only have separate training and experience requirements, but also have a separate and "distinct wage scale" and a completely

separate supervisory line of authority on up to the corporate level, including disciplinary-decision-making, as well as at least some distinction and differences in overtime and vacation policies. (Employer Exhibit A, Ex. 7, attachments to Union Response: Tr. 149, 167-72). Regardless of any overlap of any other conditions of employment, these major differences are particularly significant ***to the employees***.

Furthermore, the Employer provided no evidence of temporary transfers or interchange of production employees between the North and South Plants, nor anything other than infrequent or incidental contact between such production employees. While the Employer provided some, incomplete evidence of permanent transfers of production employees in this case, to which the Board gives less weight, Basha, Inc., 337 NLRB 710, 711n. 7 (2002), South and North Plant production employees are separately supervised on a day-to-basis, with the North Plant Superintendent having significant discretion in establishing his own personnel policies with somewhat different vacation, overtime and on-call policies between North and South Plant production employees. The equipment that North Plant production employees use is unique and different from that used by South Plant production employees requiring separate training. (Employer Exhibit A, Ex. 7: Union's Response at 9, see attached Tr. 153-54, 183-84). The (Acting) Regional Director not only took these matters into account, he also took into account that the chain-of-command in the Employer's organizational chart for the maintenance department does not merge with production until it reaches the General Manager, a significant factor in finding no overwhelming community-of-interest. Guide Dogs for the Blind, Inc., 359 NLRB No. 151 slip op. at 6 (2013)(Cristal I DDE, pp.10-11). Thus, there is no bases for Cristal's criticism of the (Acting) Regional Director's decision.

As to Cristal's reconsideration request based on its argument that the petitioned-for unit is

not conducive to effective collective bargaining, Cristal misconstrues the Board's approach, almost suggesting that wall-to-wall production, maintenance, and warehouse units are preferred. While such units in appropriate circumstances might be appropriate, even presumptively appropriate, that is not the test, as the Board well-recognized in this case, in these types of circumstances. There may be more than one appropriate unit. The Board's task, here, is merely to determine whether the petitioned-for unit is *an* appropriate unit, not the most appropriate, or even preferred, unit. If the unit is appropriate, the Board's task ends on the unit issue.

Now, in an effort to buttress its weak "ineffective bargaining" argument, that the petitioned-for unit is not conducive for effective collective bargaining, Cristal belatedly relies on ambiguous hypothetical testimony about settlement discussions from another case (Motion at 12–14), that it could have attempted to raise in its RFR here (but did not).[5/] Again, the Board is precluded from considering such matters under Rule 102.65(e)(1), since Cristal did not raise such evidentiary matters previously as part of this particular argument in *this* case. Nevertheless, ICWUC/UFCW Organizer Heasley's settlement statements are of little import, particularly given their context and ambiguity, nor does his hypothetical testimony support the conclusion that Cristal seeks to draw from it.[6/] It is too much of a stretch and spin from Heasley's theoretical response, that bargaining with one unit may be simpler than bargaining with two units, to the unsupported contention that the Union purportedly

---

[5/]Given its history of separately bargaining at adjacent Plant 1 with the United Steelworkers union, one might expect Cristal to be a little more reluctant to raise this argument.

[6/]Organizer Heasley, a non-attorney, was the only person representing the Union at the hearing at which Cristal's attorney called him as its witness in Cristal II. While Cristal's legal counsel obviously was aware that testimony about settlement discussions generally may be subject to objection and, thus, usually excluded from evidence, the Union had no one to object to this line-of-questioning while Heasley was on the stand. Given this context, the Board should give little, if any, weight to his hypothetical testimony on this matter.

recognizes the pitfalls of negotiating in multiple alleged gerrymandered micro-units. To the contrary, the Union already has shown that there are no fractured, so-called micro-units here. Unlike in so-called micro-units, where there are no rational bases for grouping employees together, there are good-faith, evidence-based reasons for grouping the North Plant production employees together, as well as grouping the warehouse employees together. As the (Acting) Regional Director correctly held, the petitioned-for unit of North Plant production employees falls well within the Employer's own administrative and supervisory grouping of employees and how it has differentiated employees, even for variations in some personnel policies.

Otherwise, Cristal's Motion raises no new arguments from its RFR to justify extraordinary circumstances for reconsideration.

CONCLUSION

WHEREFORE, for the reasons stated above, as well as in its response to the RFR in this case, the Union requests that Cristal's request for reconsideration, as well as its request to consolidate, be denied.

Respectfully submitted,

s/Randall Vehar

Randall Vehar, Esq.
UFCW Assistant General Counsel
ICWUC/UFCW Legal Department, 6th floor
1655 W. Market Street
Akron, OH 44313
330/926-1444 Ext. 115
330/926-0950 Fax
330/327-9002 Cell
RVehar@icwuc.org (alt. email)
Rvehar@ufcw.org

Robert W. Lowrey (Ohio Bar No. 0030843)
UFCW Assistant General Counsel/
Counsel for ICWUC
1655 W. Market Street
Akron, OH 44313
330/926-1444
330/926-0950 FAX
rlowrey@ufcw.org

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2017, a copy of the foregoing was electronically filed using the Board's electronic filing system and served thereby on:

Allen Binstock, Regional Director
NATIONAL LABOR RELATIONS BOARD
Region 8
1240 E. 9th Street, Suite 1695
Cleveland, Ohio 1695

and served by email on:

David A. Kadela
Brooke E. Niedecken
Littler Mendelson PC
21 East State Street, Suite 1600
Columbus Ohio 43215
dkadela@littler.com
bniedecken@littler.com
Attorneys for Employer
Cristal USA Inc.

/s/Randall Vehar
Randall Vehar